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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICARDO TORRES-ACOSTA, etc.,

Defendant - Appellant.

No. 04-10487

D.C. No. CR-03-02048-RCC

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted October 18, 2005
San Francisco, California

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

1. Ricardo Torres-Acosta's argument that the sentencing enhancement for his prior crimes violates his Sixth Amendment rights "is foreclosed . . . [because] *Apprendi v. New Jersey*, 530 U.S. 466 (2000) carves out an exception for proving the fact of

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

prior conviction.” *United States v. Brown*, 417 F.3d 1077, 1078-79 (9th Cir. 2005).

2. The district court’s denial of Torres-Acosta’s request for an additional reduction for acceptance of responsibility did not constitute plain error under the separation of powers doctrine or the due process clause. *See United States v. Ayarza*, 874 F.2d 647, 653 (9th Cir. 1989); *see also United States v. Murphy*, 65 F.3d 758, 762, 764 (9th Cir. 1995).

3. The government’s decision to decline to file a motion for the additional one-level adjustment for acceptance of responsibility was not plainly erroneous. *See United States v. Awad*, 371 F.3d 583, 587 (9th Cir. 2004) (concluding under an analogous Guidelines section that the government has no duty to make such a motion).

4. The judgment correctly stated a violation of 8 U.S.C. § 1326(a) as enhanced by 8 U.S.C. § 1326(b)(2). Because no separate violation was charged, no basis for remand exists. *Cf. United States v. Rivera-Sanchez*, 222 F.3d 1057, 1059, 1062 (9th Cir. 2000).

5. Remand in light of *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc), is appropriate because “we cannot ascertain whether the district court would have imposed a different sentence under a discretionary regime.” *United States v. Cervantes-Flores*, 421 F.3d 825, 834 (9th Cir. 2005).

LIMITED SENTENCING REMAND.